



BRB No. 16-0266 BLA  
Case No. 2010-BLA-05646

JAMES E. DUTY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LBJ ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE	)	DATE ISSUED: 07/05/2018
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	ORDER

On February 23, 2018, employer moved to hold this case in abeyance pending a decision from the United States Supreme Court in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *aff'd on reh'g*, 868 F.3d 1021 (Mem.) (2017), cert. granted, U.S. , 2018 WL 386565 (Jan. 12, 2018).<sup>1</sup> Employer's motion has been rendered moot by the issuance of a decision in *Lucia v. SEC*, 585 U.S. , 2018 WL 3057893 (June 21, 2018).

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<sup>1</sup> Employer's motion was filed approximately one year and nine months after filing its brief in support of the petition for review of the administrative law judge's Decision and Order on remand, one year and four months after the briefing schedule closed, and more than eight months after filing its Motion for Reconsideration en banc.

Furthermore, we decline to remand this case to the Office of Administrative Law Judges for further action consistent with *Lucia*. In its motion, employer argues for the first time that the manner in which the Department of Labor's administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Motion at 1-5. The Director, Office of Workers' Compensation Programs (the Director), responds that employer waived this argument by failing to raise it in its opening brief. We agree with the Director. The Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal. *See Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982). Because employer did not raise the Appointments Clause issue in its opening brief, it waived the issue.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge